Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
79-1693

TERRY TUCK, INC.,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Opinions Below.

The opinions of the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit are set out in Appendices A and B, respectively, in the Petition of petitioner herein. The opinion of the Court of Appeals is reported at 612 F.2d 465.

The judgment of the District Court was entered on November 7, 1975.

The judgment of the Court of Appeals was entered on January 29, 1980.

Jurisdiction.

The jurisdiction of the Court is invoked by petitioner pursuant to 28 U.S.C. §1254(1).

Question Presented.

The question presented by the Petitioner for review may be stated as follows:

1. May a claim for fraud against a common carrier operating in interstate commerce be stated by alleging that the carrier misquoted rates in order to retain the business of a shipper?

ARGUMENT.

The Question Presented by Petitioner Does Not Merit Review on Writ of Certiorari.

While this Court's Rule 19 is not an exhaustive statement of the Court's discretion, it does posit the generally recognized criterion for review upon a writ of certiorari, namely, that review will "be granted only where there are special and important reasons therefor." The constituent elements of "special and important" are set forth in summary form in Rule 19.1(b). Adverting to that subsection, we note first of all that the petitioner concedes in the footnote at page 3 of its petition that there is no conflict among the circuits with respect to the fact that a claim of "fraud" may not be asserted against an interstate carrier premised upon a misquotation of the carrier's filed tariff rate.[1] Nor, of course, does this case involve "an important state or territorial question" in a way that will conflict with state or territorial law.

Petitioner suggests that the Ninth Circuit has decided a federal question which conflicts with applicable decisions of this Court. In support of that position, petitioner immediately misstates the holdings in the three cases upon which it relies: *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914); *Atchison T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); and *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915). Each of those cases stands for the proposition that a *shipper* may not defraud a carrier by first stating a lesser valuation of his goods (and thereby receiving a lower freight charge) and then later, upon loss or injury to the goods, claiming that it is entitled to damages based on a higher or unlimited valuation. Pe-

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[1]The Seventh, Eighth, Ninth and Tenth Circuits are in accord.

titioner's suggestions that these cases stand for something else is simply wrong.[2]

A Claim Against an Interstate Carrier for Purportedly Fraudulent Misquotation of Rates May Not Be Stated No Matter How Artfully It Is Pleaded.

The "issue" which is the linchpin of decisions in cases of this kind is the well-settled proposition that the public policy of the United States requires that a common carrier operating in interstate commerce not deviate from its published rates, but instead offer equal rates and accommodations to all. Although the applicable statutory materials are set forth correctly in the petitioner's brief, they are worth repeating here:

> No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith . . . than the rates, fares and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit *in any manner or by any device* directly or indirectly, or through any agent or broker, or otherwise, any portion of the rates, fares or charges so specified . . . .

49 U.S.C. §317(b) [Emphasis added]. Thus, it has been uniformly held (whether or not stated as a product of a "conclusive presumption") that (1) carriers operating in interstate commerce have an affirmative legal duty to recover their full tariff charges, and (2) no defense or counterclaim is available to the shipper because of the carrier's negligent or willful misquotation or misstatement of its tariff

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[2]Respondent defers to the next section its discussion of the last possible criterion for review pursuant to Rule 19, *i.e.*, petitioner's claim that the law has not been "settled" by this Court.

charges. See *Texas & Pac. Ry. Co. v. Mugg*, 202 U.S. 242 (1906); *Illinois Central R.R. Co. v. Henderson*, 226 U.S. 441 (1913); *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94 (1915); *Aero Trucking Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Pettibone v. Richardson*, 126 F.2d 969 (7th Cir. 1942); *F. Burkhart Manufacturing Co. v. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945); *Silent Sioux Corporation v. Chicago & N.W. Ry. Co.*, 262 F.2d 474 (8th Cir. 1959); *Atchison T. & S.F. Ry. Co. v. Bonziden*, 307 F.2d 230 (10th Cir. 1962).

Additionally, this Court has held that no action will lie for a misquotation of rates even when there is a specific state statute which creates a cause of action for such misquotation. *Gulf, Colorado & S.F. Ry. Co. v. Hefley and Lewis*, 158 U.S. 98 (1895).

Respondent notes here that the cases cited next above also put to rest the last basis for granting certiorari stated in Rule 19, *i.e.*, petitioner's suggestion that the law has not been "settled" by this Court. The issue, properly framed, has been settled by this Court and by the courts of every jurisdiction where rate uniformity is required by statute for the better part of a century.

From a Practical Standpoint, the Relief Sought by the Petitioner Would Inevitably Lead to Massive Rebating and Discriminatory Practices.

If granted, the relief petitioner seeks might well result in an interstate carrier recovering less than its full tariff charges. If a claim could be stated by alleging that a carrier has fraudulently misquoted its rates to a shipper's detriment, carriers could favor certain shippers and indirectly rebate to them by simply misquoting their rates and enduring an artfully pleaded lawsuit to the effect that the shipper had been "defrauded." The shipper would then be able to re-

cover damages (or be entitled to a set off) equal to the difference between the improperly quoted rate on the one hand and the actual filed rate on the other hand. The result, of course, would be massive rebating.

It is precisely this kind of transparent artifice that the Interstate Commerce Act prohibits. It is a practical result which every jurisdiction, federal and state, has legislated against since the turn of the century. One California case that brings the foregoing sharply into focus is *R.E. Tharp, Inc. v. Miller Hay Company*, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968):

> We do not here deal with ordinary circumstances. On the contrary, the recovery of undercharges by a carrier through the judicial process is founded on salutary public policy and is not only a right but a duty. In fact, it has been repeatedly held that the recovery of undercharges is one of the most effective means of preserving the minimum rate structure and of eliminating collusion between carriers and shippers. [Citations omitted] As the court said in *Transmix Corp. v. Southern Pacific Co.* [citation omitted]:
>
> > " . . . the reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by the act of the parties."

Moreover, it is common knowledge that carriers are less than enthusiastic in their pursuit of litigation to recover undercharges from their customers. Therefore, in the absence of careful judicial supervision, inept

> pleadings could be used as a clever device to thwart the orders of the Public Utilities Commission and to contravene the legislative scheme which is designed to protect the public interest in a vital quasi-public industry.

261 Cal.App.2d at 85-86.

Conclusion.

Petitioner has failed to show a proper ground for granting certiorari. The only practical result of giving the petitioner the relief it seeks, if certiorari were granted, would be to recreate the anachronistic evils which the Interstate Commerce Act sought to abolish: *i.e.*, secret rebating and unequal treatment of shippers.

The petition should be denied.

Dated: May, 1980

Respectfully submitted,

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